United States of America

IN THE

Supreme Court of the United States

OCTOBER TERM, 1945

No.....

CYNTHIA MILLS CLEVELAND,
Petitioner and Defendant Below,
vs.
SECOND NATIONAL BANK AND TRUST COMPANY
of Saginaw, Michigan, individually and as Trustee
under the Ninth and Tenth Paragraphs of the Will
of Arthur D. Eddy, Deceased,
Respondent and Plaintiff Below

BRIEF FOR PETITIONER, CYNTHIA MILLS CLEVELAND, IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

I.

OPINION OF THE SIXTH CIRCUIT COURT OF APPEALS

The opinion was filed May 22, 1945, and is found reported in 149 Fed. (2d) 466.

II.

JURISDICTION

The date of the Judgment to be reviewed is July 23, 1945, when petition for rehearing of the judgment of May 22, 1945, was denied.

Appellate jurisdiction is based upon Section 344 of Title 28 of U. S. C. A. and the Constitution of the United States.

III.

SPECIFICATION OF ERRORS

The errors in the opinion and judgment of the District Court entered on November 30, 1943 and of the Sixth Circuit Court of Appeals entered May 22, 1945 rehearing denied July 23, 1945, which are relied upon by Petitioner, are set out in the statement of "Reasons Relied Upon for Allowance of Writ" in the accompanying petition for Writ of Certiorari.

Petitioner relies upon and will urge before this Court, all of the errors therein assigned.

IV.

BRIEF STATEMENT OF FACTS AND ISSUES

A. Summary of Counsel Fee Judgment of November 30, 1943—

This Judgment required Petitioner (one-sixth remainderman Cleveland) to pay all the Respondent Trustee's

counsel fees of $40,000 (except $1000) incurred upon *three distinct issues,* and decided by two separate judgments, as follows:

FIRST: In a fraud claim (first case judgment, entered December 13, 1938) brought by the ancillary Administrator of petitioner's mother, Lila Eddy Doebler, against the Respondent Trustee—in which fraud claim (denied by the Court) Petitioner Cleveland had no interest in or right to any part of any possible recovery.

On the contrary, such a recovery would have reduced petitioner's one-sixth of the residuary legacy—as well as the Charitable Trust's one-half of the residue—and testator's widow's one-third share. They all benefited two and three times more—by the Judgment (over-ruling the claim of fraud) than did Petitioner, *who* upon no theory should have been required to pay more than one-sixth of any counsel fees allowed to the Respondent Trustee, for defending the Estate against the fraud claim.

SECOND: In the life tenant's (Doebler) unpaid income accounting claim of $181,000, by her ancillary administrator, against the Respondent Trustee (second case judgment, entered February 7, 1939) any recovery of which would have decreased petitioner Cleveland's one-sixth of residue, as well as the charitable trust's and the testator's widow's residuary interest.

No part of any recovery of this admitted unpaid income would have belonged to Petitioner Cleveland.

THIRD: In Petitioner Cleveland's claim (also covered by the second judgment of February 7, 1939) for losses in her one-sixth share of the trust corpus, a recovery was denied on the ground no losses did actually occur, not-

withstanding Trustee's amended accounting bill admitted it had lost over $125,000 belonging to Petitioner's one-sixth share of the residue in the thirteen year life estate period ending in 1938.

B. Proceedings Before Final Hearings.

(a) Trustee's Amended Bill.

The Respondent Testamentary Trustee, in 1935 filed its amended accounting complaint, admitting over $800,000 lost in a net estate appraised at $3,767,000 at testator's death in 1925. The assets consisted of corporate stocks and bonds, accounts receivable and real estate, in Saginaw, Michigan, in all of which large losses were admitted. The defendants were:

(1) a life tenant of one-third of the residuary estate, testator's sister (Doebler) and

(2) a residuary legatee of one-sixth of the residuary estate, testator's niece (Cleveland) and her two minor children.

but—the residuary legatees of five-sixths of the estate, the Charitable Trust and Testator's widow, were not made parties to the Trustee's amended bill of complaint filed in March, 1935.

(b) Defendants' Answers.

Defendant Life Tenant Doebler died in May, 1938, thus ending a thirteen year life estate. Her Administrator answered, claiming large unpaid income accruals.

Her Administrator also claimed by cross complaint that testator Eddy had defrauded his sister Doebler in 1920, out of several hundred thousand dollars, by false state-

ments of value of her interests then purchased by her brother, the Testator.

Thus—although neither of the two claims of fraud or unpaid life estate income belonged to the petitioner Cleveland (since they belonged to her Mother's estate in which she took nothing) nevertheless the petitioner's one-sixth residuary interest in the Estate was ordered to pay all the Respondent Trustee's counsel fees of $39,000 on all the three issues and in all three Courts.

Defendant and Petitioner Cleveland also answered and demanded, as a one-sixth residuary legatee, that Respondent Trustee justify and exonerate admitted losses of $125,000 in her one-sixth remainderman's interest during the thirteen year life estate period.

(c) In September, 1936, the Trustee filed its accounting prepared by certified public accountants of Baltimore, Maryland, Messrs. Wooden and Benson.

This audit (Exhibits 3, 4 and 5) covered the years of April 1925 to June 30, 1938—and showed:

(1) $181,000 due life tenant Doebler (petitioner's mother);

(2) $181,000 due the Charitable Trust—

(3) Losses of $750,000 in the corpus of the estate of which Petitioner's one-sixth of the residue thus lost $125,000—which included

losses of $540,000 in the Corporate Stock account, of which Petitioner's loss was one-sixth.

(d) Petitioner Cleveland filed exceptions to *only one loss*—that is, in the corporate stock account—*and no exceptions were filed* to the Trustee's admitted losses in the

corporate bonds, real estate and accounts receivable, totalling about $200,000, of which her loss was also one-sixth.

(e) Thus—*the only issue* between Petitioner Cleveland and the Respondent Trustee was whether it had negligently speculated in the corporate stocks of various corporations—the principal losses in which were in local Saginaw corporations doing a banking business with the Trustee Bank.

(f) Under Michigan Law (*Davidson v. Young,* 290 Mich. 266) the Trustee, therefore, was required to justify these admitted stock losses—and the burden of proof was upon it—and Petitioner Cleveland had full right of cross examination of the Trustee's witnesses.

(g) On the Hearing of Trustee's Petitions for Counsel fees resulting in the judgment of November 30, 1943, the Trustee's Counsel could not point out any excessive or unnecessary cross examination by her counsel.

The District Court made no finding whatever that any part of the expense of the final hearing was increased unnecessarily by the defendant (petitioner) Cleveland's inquiries into these admitted heavy losses in the corporate stocks forming the large part of the corpus losses suffered in the years of 1925 to 1938.

C. Issues Tried and Parties Involved—

Judgment of December 13, 1938—Fraud Case.

The District Court entered Findings and Judgment of no fraud, based almost entirely on some old 1919 letters between the testator and his sister, Mrs. Doebler—

which the Administrator's counsel did not know about—and inspection of which prior to taking of proofs by depo-

sition on the fraud claim—and full preparation—was refused by the District Court to the Administrator.

This judgment of December 13, 1938—denying relief to Mrs. Doehler's Administrator on the Fraud Claim—

merely awarded "costs" to the Respondent Trustee to be taxed (Record First Appeal p. 100).

Therefore—the Fraud issue was the sole controversy involved in this First Judgment of December 13, 1938, and was between the administrator of Petitioner's mother and the Trustee—who was defending the residuary estate belonging (1) one-half to the charitable trust—not ever a party in the case at all—(2) one-third to testator's widow and (3) one-sixth to petitioner Cleveland, Testator's niece.

Judgment of February 7, 1939—Unpaid Income and Corpus Loss Case.

On these Issues the District Court entered Findings and Judgment as follows:

(1) Income issue—

That no unpaid Income was due Mrs. Doebler's administrator—as a matter of law—

although the Trustee's audits admitted $181,000 of net income had accrued in thirteen years of life estate—which had not been declared as dividends by the small family holding company—but under the accounting order of the District Court of April 11, 1936, the auditors had been directed to disregard the corporate entity entirely—and figure net income, regardless of the dividends declared by the Board of Directors.

(2) Mismanagement Issue—

That no losses had occurred in the corpus of Petitioner's one-sixth residuary trust interest—and if losses had occurred the Trustee had not been negligent although the accountings and audits of the Respondent Trustee made under the order of April, 1936, showed $540,000 of losses in corporate stocks alone—during the life estate period of thirteen years.

Parties on the Income Issue—the testator's sister's administrator was the plaintiff and the Trustee the defendant.

The Trustee thus defended the interests of the three residuary legatees—one-half belonging to the Charitable Trust, one-third to the testator's widow and one-sixth to petitioner Cleveland.

Petitioner Cleveland had filed exceptions on November 14, 1936 (R. 123), Numbers 13 to 19 against the Doebler (mother's) claims of unpaid income.

She, therefore, defended (with the Trustee) the interests of the Charitable Trust and of the Testator's widow—

but the Judgment of November 30, 1943 (here appealed from) ordered petitioner Cleveland's one-sixth residuary interest to pay the entire Trustee's counsel fee bill of $39,000—and its auditor's expenses of over $5,000.

D. Forms of Two Judgments of December 13, 1938 and February 7, 1939.

(a) The Fraud Judgment of December 13, 1938, provided:

> "• • • that costs will be awarded at the completion of the entire case by the court, and taxation

thereof be reserved until that time; that the remaining issues raised by the other pleadings in the above entitled cause stand for trial in accordance with the rules of this Court." (First Case Record, p. 100.)

(b) The Income and Corpus Mismanagement Losses Trustee's Accounting Judgment of February 7, 1939, directed the Trustee to—

"• • • file with this Court a report of its disbursements in the above matter, together with statement of accounts of its auditors and counsel, and upon approval thereof by this Court, and prior to the turning over of any assets, that the same be paid out of the dividends due on the shares of stock eventually to be turned over to Cynthia Mills Cleveland • • •

10. No counsel fees shall be taxed by plaintiff except as herein provided for in this decree to be reported by said trustee and allowed by the Court under paragraph 8 hereof. • • •" (R. 258.)

V.

ARGUMENT ON LAW

POINT I

"COSTS" DO NOT INCLUDE COUNSEL FEES IN A FRAUD ACTION

The *fraud case judgment* of December 13, 1938, dismissed the Doebler Administrator's fraud complaint, and provided:

> "that costs will be awarded at the completion of the entire case by the Court, and taxation thereof be reserved until that time. * * *"

After affirmance, such judgment *cannot* be made the basis in the District Court—

for assessing Petitioner Cleveland the Respondent Trustee's claimed Attorneys' fees, in defending the entire Trust Estate against the Doebler (mother) Administrator's fraud claims.

The Fraud action by the mother's administrator against the family holding corporation, C. K. Eddy and Sons, and the Testamentary Trustee—resulting in the judgment of December 13, 1938, was strictly a party against party action —and no extraordinary counsel fees are ever allowed against the defeated party plaintiff. Only the usual statutory attorneys fees can be taxed as "costs."

> *Grant v. Fletcher*, 283 Fed. 243; Opinion by Hon. Arthur J. Tuttle, District Judge (who entered the counsel fee judgment of November 30, 1943, here appealed from)—

And see—

Oelrichs v. Spain, 15 Wall. 211;
Flanders v. Tweed, 15 Wal. 450.

Counsel Fees in the Fraud Action.

No extraordinary counsel fees in a party against party fraud action being allowable—obviously no power existed in the District Court to allow as "costs" extraordinary counsel fees in this fraud action.

This is the rule whether the allowance is for services in the District Court or for services in the Court of Appeals or the Supreme Court.

No part of any of this fraud action recovery would have belonged to Petitioner Cleveland under her mother's will —

since the residue went to Mrs. Doebler's grandchildren —and then only if they survived their mother. R. 128, First Fraud Case judgment of December 13, 1938.

POINT II

THE MANDATES OF THE COURT OF APPEALS EXPRESSLY LIMIT COUNSEL FEES ON APPEAL TO THE USUAL $20 TAXABLE FEE

That this is the rule of the Federal Courts is decided by such cases as

Kansas R. R. v. Trust Co., 281 U. S. 1;
Sprague v. Ticonic Bank, 307 U. S. 161.

In *Kansas R. R. v. Trust Co., supra,* this Court held that a decree allowing "costs" to be taxed does not

include counsel fees—and that the purpose to include attorneys fees must be clearly expressed in the decree or judgment.

So held as to words—

> "to leave the taxation of costs to the court below under the principles, rules and practice in equity."

See bottom first column, page 7 of 281 U. S.

In *Sprague v. Ticonic Bank* (307 U. S. 161), *supra,* the efforts of one plaintiff to establish his rights under a deed of trust—also established the rights of other parties similarly situated.

It was held—

(1) That Plaintiff to recover an allowance of attorneys fees from the *other trusts, cestui que trusts,*—did not have to sue as for a class—

and the allowance could be made after the term of Court.

(2) *Very Important* was this Supreme Court's opinion that *no counsel fees* could be allowed—if the Mandate of the Appellate Court did not provide for such fees—citing *Kansas R. R. v. Trust Company, supra,* on page 168 of the opinion in 307 United States.

This Court held the question of "costs as between solicitor and client" (see page 169) *had not been passed upon* by any Court at all—in the Sprague Case —but that had the Mandate in the Ticonic Case, as in the Kansas Trust Case in 281 U. S. 1, merely allowed "costs" then that was the end of the claim for extraordinary counsel fees.

(3) Thus—in the case at bar—

(a) The fraud judgment of December 13, 1938 only allowed "costs" to be taxed—therefore, under *Kansas R. R. v. Trust Company, supra,* no extraordinary counsel fees are to be allowed in either the District Court or the Appellate Courts.

(b) Also the Court of Appeals' Mandate only allowed $20 counsel fees in that Court.

(c) Also the fraud action (judgment of Dec. 13, 1938) was a strict party against party case—as in *Grant v. Fletcher* (in 283 Fed. opinion by Judge Tuttle) so no counsel fees in any Court were allowable upon any theory—for it was not a case involving recovery of a fund brought into Court—as in the *Ticonic* case, *supra.*

POINT III

THE TRUSTEE COMMENCED THIS LITIGATION—AND THE BURDEN OF PROOF TO JUSTIFY ADMITTED LOSSES WAS ALWAYS UPON IT, UNDER THE MICHIGAN RULE OF DAVIDSON v. YOUNG, 290 MICH. 266

The Respondent Trustee's amended bill filed against Petitioner Cleveland, a residuary legatee (one-sixth interest) admitted it had lost $125,000 of her legacy.

The Michigan Rule is that under such circumstances—the Burden of Proof rests upon the Trustee to justify its admitted losses of trust estate corpus.

POINT IV

THE TRUSTEE'S ACCOUNTING JUDGMENT OF FEBRUARY 7, 1939 WAS NOT RES ADJUDICATA

The Judgment of February 7, 1939, requiring the Plaintiff to file with this Court a "* * * report of its disbursements in the above matter * * * and upon approval thereof by this Court * * *" was not *res adjudicata,* either

(1) of amount of counsel fees and auditors expenses—or

(2) of appellant Cleveland's obligation to pay the same—or any part of them.

Simmons Co. v. Grier Co., 258 U. S. 82, 89.

POINT V

THE DISTRICT COURT'S FINDINGS ON COUNSEL AND AUDITOR'S FEES

District Judge Tuttle made oral findings (R. 178) summarized, as follows:

(a) The Trustee's Counsel had no per diem agreement with the Trustee for their legal services (R. 180)

Therefore, that in fixing a reasonable value of such legal services, the Court must consider "the amount involved, the good results obtained, and the high grade of the lawyers doing the work, which are all elements to be taken into account" (R. 181).

That the $39,000 of fees charged "are reasonable and fair and just" (R. 181).

(b) That since the judgment of February 7, 1939 was affirmed—it was "res adjudicata" that appellant Cleveland must pay all the Trustee's entire counsel fees (R. 182).

The District Court said orally:

> "Now it is my understanding in that regard, in the first instance, that that was decided by this Court at the original hearing from which an appeal has been taken and on review was affirmed and certiorari denied. It is my understanding, that it is fully settled and *res adjudicata*, decided, and not open to review by this Court." (R. 182.)

Counsel Fee and Auditor's Expense Judgment of November 30, 1943.

Thereupon, the District Court entered Judgment against Petitioner Cleveland for $47,113.14 (R. 48-193)—consisting of—

(1) $39,000 Counsel fees

(2) $5,313.03 Auditor's fees and expenses

(3) $1,100 Counsel's expenses

(4) $780 Expert witness fees and photographs as Exhibits

(5) $600.00 Briefs and Transcripts.

The District Court at the conclusion of the two day hearing resulting in the counsel fee judgment of November 30, 1943, here appealed from (R. 48)—

found as a fact that petitioner Cleveland had started all this litigation involving three separate and distinct issues —and, therefore, should pay the entire counsel fee and auditors bills of the plaintiff Trustee.

No issue was framed and no evidence whatever appears in the entire record to support in the smallest degree this Conclusion.

On the contrary—the entire Record shows that the ancillary administrator of Petitioner's mother (Mrs. Doebler) owned and controlled the fraud and income claims—and was the only party who could have benefited by any recovery.

Under such circumstances, the judgment of November 30, 1943, against petitioner Cleveland is wholly unjustified—since the trust corpus case judgment of February 7, 1939 (made the basis of this November 30, 1943 judgment) was not a final judgment—see *Simmons Company v. Grier Company,* 258 U. S. 82, 89.

That the District Court has no power to allow counsel fees in the Court of Appeals is clearly shown by the opinion of District Judge W. Calvin Chestnut in *American Trust Company v. Speers,* 60 Fed. (2d) 994, 997.

POINT VI

OPINION OF CIRCUIT COURT OF APPEALS

The Court of Appeals reasons for affirmance of the District Court's counsel fee judgment of November 30, 1943, against Petitioner—are reported in 149 F. (2d) 466, and may be summarized as follows:

(a) That petitioner Cleveland, a defendant in the Respondent Trustee's amended Testamentary accounting complaint (admitted losses in petitioner's one-sixth residuary remainderman's interest of $125,000) had harassed Trustee by complaining of these losses—which were to have been expected, as the Court of Appeals reasoned, to occur during the depression of 1930 to 1933, etc.

The *fault* with this Conclusion of the Lower Appellate Circuit Court of Appeals is that the only losses Petitioner Cleveland asked justification of (see *Davidson v. Young*, 290 Mich. 266)—

were in speculative local corporate stocks, during the years following testator's death in April, 1925—in which period the Respondent Trustee had ample time to have disposed of the doubtful shares—without a loss.

Petitioner asks permission to fully advise this Court on this point of the Court of Appeals' opinion—since it may be of some importance.

Thus—the Court of Appeals in its opinion stated:

> "The charges of mismanagement and fraud were not in any substantial respect supported. Their only basis was lack of clairvoyance on the part of the trustee in sensing an impending world-wide economic crises, a prescience denied to the foremost industrialists and financiers of the period."

In this assumption, the Court of Appeals was in manifest error for petitioner Cleveland, a one-sixth residuary legatee—made no such claim and took no such position in any Court—for the following very obvious reasons:

(1) Testator Arthur Eddy died in April, 1925.

For more than four and one-half years there was a period of rising stock prices. No effort was made by Respondent Trustee to liquidate the trust estate's holdings of capital stock in several local Saginaw speculative corporations—several of which kept their Company accounts at Trustee Bank.

By the fall of 1929 the Eddy Estate's holdings in these local companies—such as Consolidated Coal Company—had declined in value several hundred thousand dollars—and it was so admitted.

See Trustee's Amended Bill, paragraphs 8 and 9 Record 19, second judgment of February 7, 1939.

(2) *This entire loss* was due almost entirely to local Saginaw conditions peculiar to the particular business of these companies. See testimony of Auditors Walton and Collins—R. 235 to 315 and 335 to 360.

This entire loss could have been entirely made up and recouped—had the Trustee sold the Estate's holdings of the capital stock in the Trustee Bank—which Estate's Bank shares were appraised in 1925 at testator Eddy's death at $300,000. A sale of these Bank shares (converted into Guardian Group Banking Corporation's shares in December, 1929, by Trustee) could have been sold any time in February, March or April, 1930 by the Trustee Bank for $1,000,000. See Exhibit 70, Page 319 of Second Case Record.

(3) This $1,000,000 so realized from a sale of the Estate's Bank shares owned by the Eddy Trust would have—

(a) Paid in full their 1925 appraised value of $300,000 and also

(b) Paid in full the $500,000 or so lost by the Trustee Bank by its failure to sell any of these speculative local corporate stocks in the 1925 to 1930 period of rising stock market prices.

(4) Instead this Trustee Bank kept every share of the so-called Bank Group, Inc. stock it received for the Estate's holdings in the Trustee Bank—and lost the entire $1,000,000 of market value by the March, 1933, Bank Closing Holiday.

Then this Trustee Bank had to pay out $54,000 in Bank stock assessments—

then in 1933—it used $240,000 of the Eddy Estate money to buy back from the Group, Inc. Receiver—the Bank's capital stock—which the Trustee Bank had traded in 1929

for Group, Inc. shares—this purchase was made on the theory that the repurchase of the Bank's entire capital stock was a very good deal—

since then, however, the Trustee Bank has sold most of the Eddy Estate's holdings in the Trustee Bank's repurchased capital stock—although its market price has been constantly increasing—from year to year.

(5) To conclude—Petitioner wishes this Supreme Court to know—that never in this testamentary trustee's accounting suit—did she file any exception to—or object to large admitted losses by this Trustee in the years of 1929 to 1930 sustained by the Eddy Estate in declining (1) bond value, (2) real estate values, (3) accounts receivable, etc.

(6) What Petitioner did consider she had a perfect right to do—was to ask the Trustee Bank to justify the Eddy Estate's losses in these local Saginaw speculative corporate stocks—

not in the depression years of 1931 to 1938—*but* in the rising stock market value years of 1925 to 1929—

This justification, this petitioner, as a defendant in the accounting suit brought by Trustee Bank, had the legal and moral right to, under the rule in Michigan of

Davidson v. Young, 290 Mich. 266.

(7) Petitioner respectfully suggests that it took no "clairvoyance" on the part of any corporate Trustee—to enable it to sell in the Spring of 1930 for $1,000,000 Bank Group shares appraised at $300,000 in 1925—and with the profits to recoup for the *cestui que trusts* the $500,000 of losses suffered in the years of 1925 to 1930 in the speculative local Saginaw Corporations' stocks retained by the Trustee Bank.

(b) In its opinion, the Court of Appeals, said:

> "The appellant initiated the main controversy, she joined in her mother's cross bill, and the lawyers were the same or associated."

(1) Petitioner Cleveland did not join in the cross bill filed by her mother's Administrator asking damages for the fraudulent under-statement of $700,000 in the fair value of her interests sold in 1920 to her brother Arthur Eddy.

See the Administrator's amended answer and cross bill, R. 1, first appeal, Cause No. 8336.

(2) After the administrator had filed on August 30, 1938, his cross bill for damages for this fraudulent understatement of value—the Trustee Bank—on August 30, 1938, filed a motion to strike this cross bill from the files—on the ground that the administrator "has no right, title or interest in" the causes of action, which were vested "in the Mercantile Trust Company of Baltimore, Maryland."

R. 131, Second Appeal, Cause No. 8366.

(3) Thereupon, Petitioner and ner children as heirs at law, asked leave to be parties "if it is necessary" to protect their rights.

(4) Thereafter—the District Court on August 30, 1938, permitted the ancillary administrator Van Auken (previously appointed by the Saginaw Probate Court) to proceed as the duly accredited representative of the mother's Estate—in course of administration in Baltimore.

See R. 228, Second Appeal, Cause No. 8366.

Thus ended any part Petitioner Cleveland ever took in the first fraud action by the Administrator Van Auken—and which was actually and in fact—prosecuted by the Ad-

ministrator, Van Auken, representing the will filed in the Orphans Court in Baltimore.

Nor did appellant Petitioner (in this fraud case) appeal from the adverse judgment of December 13, 1938, dismissing the administrator's cross bill (R. 492).

But Petitioner's children by a guardian ad litem did appeal, since they had an interest under their grandmother's will. Petitioner Cleveland had none.

(c) In its opinion, the Court of Appeals further summarized, as follows:

> "It was against this background of persistent, harassing, and futile litigation that the final account of the trustee came on for hearing before the district judge, * * *
>
> Furthermore, the court found that Mrs. Doebler had received all the income of the trust to which she was entitled."

TO THESE CONCLUSIONS—PETITIONER CLEVELAND RESPECTFULLY URGES FULL CONSIDERATION OF THE FACTS SET FORTH IN APPENDIX A TO THIS BRIEF.

POINT VII

CONCLUSION OF BRIEF

A. An issue whether Petitioner Cleveland is legally chargeable with all Trustee's counsel fees in both cases Nos. 8336 and 8366 should be framed and tried.

Petitioner never had any opportunity to defend herself on this issue—and no witness ever testified she is to be blamed for the mother's Administrator's fraud action.

Not one word of testimony in the entire record bears on this question. There are no pleadings and no proofs to support the entry of the Judgment of November 30, 1943, awarding against Petitioner Cleveland the sum of $39,000 of Respondent Trustee's counsel fees.

B. The Reasons Relied upon for Allowance of the Writ of Certiorari are well founded.

Respectfully submitted,

WILLIAM ALFRED LUCKING,
Attorney for Petitioner, Cynthia Mills Cleveland,
1607 Ford Building,
Detroit 26, Michigan.

CERTIFICATE OF COUNSEL

The undersigned does hereby respectfully certify to this Honorable Court that he has prepared the annexed Petition for Writ of Certiorari and is familiar with the matters and statements and points therein set forth and verily believes the same to be well founded—that this petition is not filed for purposes of delay—and that he is authorized to file the same in behalf of said petitioner.

WILLIAM ALFRED LUCKING

Dated: October 16, 1945.